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Supreme Court, U.S.
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No. 04-1294

IN THE

Supreme Court of the United States

RUDOLF KERN AND
JOHN S. HABBLETT, LTC (RET.) *ET AL.*,

Petitioners,

v.

SIEMENS CORPORATION *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state as follows:

Respondent Siemens AG has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Respondent Siemens Corporation is a wholly owned indirect subsidiary of respondent Siemens AG, and no other publicly held corporation owns 10% or more of its stock.

Respondent Bosch Rexroth AG is a wholly-owned subsidiary of Robert Bosch GmbH, and no other publicly held corporation owns 10% or more of its stock.

Respondent Bosch Rexroth Corporation is a wholly owned subsidiary of Robert Bosch Corporation, and no publicly held corporation owns 10% or more of its stock.

Respondent Omniglow Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

It is elementary that Rule 23(b)(3) of the Federal Rules of Civil Procedure authorizes the certification of so-called "opt out" classes, where absent class members must be given the option of opting *out* of a class. The district court here turned that provision upside down by certifying a Rule 23(b)(3) "opt in" class, where absent class members were required affirmatively to opt *into* the class. The district court freely acknowledged that its approach was both unprecedented and unauthorized by the Rule. Nonetheless, the court declared that the Rule's requirements were "immaterial," and proceeded to certify an "opt in" Rule 23(b)(3) class under its general "equitable powers." Pet. App. 23-24a. Not surprisingly, a unanimous panel of the Second Circuit reversed, holding (per Judge Cabranes) that a district court's equitable powers in this area are bounded by Rule 23, and hence the class certification decision in this case was erroneous, because Rule 23(b)(3) does not authorize "opt in" classes.

Petitioners now ask this Court to reverse the Second Circuit's decision. Curiously, however, petitioners never even address the Second Circuit's reasoning. Rather, petitioners simply insist that "Rule 23 contains no prohibition of opt-in classes," and that "[d]ecisions by other courts support this position and are inconsistent with the Second Circuit's decision." Pet. 7. As the Second Circuit pointed out, however, Rule 23 does not authorize "opt in" classes, and no court until this case had ever purported to certify such a class. In particular, the allegedly "inconsistent" decisions on which petitioners rely are readily distinguishable, because they do not present the question whether a court can certify an "opt in" class at all, but the very different question whether a court that has certified an opt-out class under Rule 23 can nonetheless require class members to submit a claim form to recover damages. In any event, the Second Circuit emphasized that even if Rule 23 could be read

to authorize "opt in" classes in appropriate cases, this simply is not such a case.

Because petitioners fail to identify anything in Rule 23(b)(3) authorizing courts to certify "opt in" classes, or any federal appellate decision construing that provision to convey such authority, or any reason why such certification would be appropriate here in any event, this Court should deny the petition.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

This case arises out of what plaintiffs themselves have called "the worst tragedy in post-World War II Austrian history." In November 2000, a funicular train carrying skiers up a mountain in the Alpine village of Kaprun, Austria, caught fire in a tunnel and 155 people perished. The victims were primarily Austrian nationals (92), but also included 37 Germans, ten Japanese, eight Americans, four Slovenians, two Dutch, one Briton, and one Czech. The Austrian authorities immediately launched a thorough criminal investigation, and concluded that the fire had been caused by a defective space heater that had been improperly placed in the driver's cab, where it overheated and in turn ignited a hydraulic fluid line.

B. Proceedings Below

Within months of the accident, plaintiffs began filing numerous lawsuits in the United States (originally as individual actions and subsequently amended to be putative class actions) against more than a dozen defendants (primarily Austrian companies and their European and American corporate affiliates) allegedly connected to Kaprun and the train. On plaintiffs' motion, the cases were referred to the Judicial Panel on Multidistrict Litigation, which entered a consolidation order. *See In re Ski Train Fire in Kaprun, Austria on November 11, 2000*, 175 F. Supp. 2d 1379 (J.P.M.L. 2001).

That order transferred the cases to the Southern District of New York for coordinated pretrial proceedings. *See id.* at 1379-80.

After the transfer, plaintiffs filed a single Consolidated and Amended Complaint, and moved for class certification. In October 2003, the district court (Scheindlin, J.) entered an order conditionally certifying under Fed. R. Civ. P. 23(b)(3) a class of "all heirs, beneficiaries and personal representatives of all individuals who died in the fire *who consent to inclusion*." Pet. App. 1a (emphasis added; internal quotations and brackets omitted). The court acknowledged that "Rule 23 does not explicitly authorize courts to certify 'opt-in' classes under Rule 23(b)(3)," and that "this Court has been unable to find a case in which an 'opt-in' class was certified under Rule 23." Pet. App. 22-23a. Nonetheless, the court asserted that "[t]his Court's authority to certify an opt-in class, where necessary, derives from its equitable powers." Pet. App. 23a. And an "opt in" class was "necessary" here, the court declared, "[b]ecause participation in the class requires prospective members to take affirmative action—namely, to consent to be bound by the judgment," and "it would be unfair to presumptively include members in a class for which membership depends upon the waiver of a right." Pet. App. 22a. The district court entered a final class certification order in November 2003. *See* C.A. App. 400-01.

Defendants successfully sought interlocutory review of that order under Rule 23(f). After full briefing and oral argument, a unanimous Second Circuit panel reversed the class certification order. *See* Pet. App. 29-44a. As the Second Circuit explained, "the District Court overstepped the bounds of Rule 23 by certifying an 'opt in' class." Pet. App. 31a. In particular, nothing in the language of the Rule, and no case applying the Rule, supported the district court's attempt to transform the "opt out" mechanism of Rule 23(b)(3) into an "opt in" mechanism. Pet. App. 35-42a. Moreover, "even if

circumstances necessitating the certification" of an "opt in" class could *ever* be shown, "neither the District Court nor [petitioners] have done so in the case before us." Pet. App. 42a.

Petitioners did not pursue rehearing in the Second Circuit, but now seek a writ of *certiorari* from this Court.

REASON FOR DENYING THE WRIT

The Second Circuit Correctly Held That The District Court Erred By Certifying An "Opt In" Class, And The "Conflict" Alleged By Petitioners Is Illusory.

The petition should be denied because the Second Circuit correctly held that the district court erred by certifying an "opt in" class, and the "conflict" alleged by petitioners is illusory. As the Second Circuit recognized, nothing in Rule 23 authorizes certification of an "opt in" class, and no court prior to this case had ever certified such a class.

Petitioners insist, however, that "the Second Circuit decision is contrary to the text of Rule 23." Pet. 6 (capitalization modified). Petitioners are wrong. Rule 23 expressly provides (in a provision tellingly omitted from the petition):

> The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, *and who have not requested exclusion*, and whom the court finds to be members of the class.

Fed. R. Civ. P. 23(c)(3) (emphasis added); *see also* Fed. R. Civ. P. 23(c)(2)(B) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including … that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded."). These provisions make it clear that Rule 23(b)(3) is an *opt out*

provision. As the Second Circuit (and indeed even the district court) recognized, nothing in Rule 23 authorizes certification of *opt in* classes. *See* Pet. App. 35-38a & nn.5, 6; Pet. App. 23a.

Petitioners challenge that conclusion by relying on Rule 23(d). That provision, petitioners note, "gives a court discretion to design class notice 'for the fair conduct of the action' and to permit class members to 'intervene' or 'come into the action.'" Pet. 6 (quoting Fed. R. Civ. P. 23(d)). But Rule 23(d) on its face governs "the *conduct* of actions to which this rule applies," Fed. R. Civ. P. 23(d) (emphasis added), not the standards for certifying a class in the first instance. If a putative class does not satisfy the certification requirements of subsections (a) and (b) of Rule 23, nothing in subsection (d) can save it. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) ("In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)."). Rule 23(d), in other words, *presupposes* that a proper class has been certified under Rule 23(a) and (b), and does not alter or expand the standards for class certification.

Petitioners (like the district court) thus frame the issue precisely backwards by insisting that "Rule 23 contains no *prohibition* of opt-in classes." Pet. 7 (emphasis added); *see also* Pet. App. 22a ("[T]here is nothing in the rule or case law that *precludes* ["opt in"] certification.") (emphasis added). The key issue here is not whether Rule 23 *prohibits* opt-in classes, but whether the Rule *authorizes* such classes in the first place. Contrary to the district court's assertion, the absence of such authorization is not "immaterial," Pet. App. 23a; it is dispositive. Courts do not have free-floating equitable authority to certify classes outside the comprehensive framework of Rule 23. *See, e.g., Amchem*, 521 U.S. at 620 ("[O]f overriding importance, courts must be mindful that the Rule ... sets the requirements that they are bound to enforce. Federal Rules take

effect after an extensive deliberative process involving many reviewers.... The text of [the Rule] ... limits judicial inventiveness."); *cf. Carlisle v. United States*, 517 U.S. 416, 425 (1996) ("Whatever the scope of th[e] 'inherent power,' ... it does not include the power to develop rules that circumvent or conflict with the Federal Rules of [Civil] Procedure.").

Indeed, Rule 23 was amended in 1966 precisely to eliminate "opt in" (or "spurious") class actions. *See, e.g., In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1134-35 (7th Cir. 1979) ("Rule 23 was amended to eliminate the spurious class action."). Before then, the Rule allowed certification of a class binding only on those members who opted in. Such spurious class actions, however, "failed to fulfill one of the principal reasons for the existence of class suits—to improve judicial efficiency by reducing the number of suits that might arise from a single wrong to many individuals." *Green v. Wolf Corp.*, 406 F.2d 291, 297-98 (2d Cir. 1968). Thus, "one of the important changes introduced by the present Rule 23 was to make the judgment in a class action binding upon all members of the class, whether they appear in the action or not, unless a member affirmatively 'opts out' of the litigation at the onset." *Id.* at 298 (citing Fed. R. Civ. P. 23(c)(2)(B)). Indeed, the advisory committee that drafted the Rule expressly rejected the "suggest[ion] that the judgment in a (b)(3) class action, instead of covering by its terms all class members who do not opt out, should embrace only those individuals who in response to notice affirmatively signify their desire to be included." Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 397 (1967).

Because (as this Court has explained) "Rule 23(b)(3) 'opt-out' class actions superseded the former 'spurious' class action," *Amchem*, 521 U.S. at 615, it is not surprising that—until the decision below—no court had ever certified an "opt

in" class under Rule 23. Petitioners insist, however, that "[d]ecisions by other courts support [certification of "opt in" classes] and are inconsistent with the Second Circuit's decision." Pet. 7-9 (citing *Snell v. Allianz Life Ins. Co.*, 327 F.3d 665, 669-70 (8th Cir. 2003); *Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 394 (3d Cir. 1981); *Robinson v. Union Carbide Corp.*, 544 F.2d 1257, 1260-61 (5th Cir. 1977); *Spark v. MBNA Corp.*, 157 F. Supp. 2d 330, 340 (D. Del. 2001), *aff'd mem.*, 2002 WL 31059209 (3d Cir. Sept. 16, 2002); *Enterprise Wallpaper Mfg. Co. v. Bodman*, 85 F.R.D. 325, 327 (S.D.N.Y. 1980); *Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391, 403-04 (S.D. Iowa 1968); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 459 (E.D. Pa. 1968)). Once again, petitioners are mistaken.

As the Second Circuit recognized, the cases on which petitioners rely do not involve "opt in" classes at all. Rather, they involve "opt out" classes in which the absent class members were required to submit a claim form in order to recover *damages*. Thus, like the district court, petitioners

> ignore[] the critical difference between, on the one hand, requiring an individual to take affirmative action to join a class for liability determination purposes and, on the other hand, requiring a class member to take action (such as filling out a claim form) in order to obtain the ultimate relief. The former is an "opt in" provision and the latter is not, since a class member who fails to obtain ultimate relief because he did not fill out a claim form is nonetheless still a class member.

Pet. App. 39-40a; *see also Robinson*, 544 F.2d at 1262 (Wisdom, J., concurring) ("The supplemental notice in this case does not violate the amendment to Rule 23(c)(2) because it does not require members to opt-into the class action in order to be bound by it. ... The supplemental notice, directed only to those

members who had not excluded themselves, merely conditioned the receipt of individualized non-injunctive relief on the submission and proof of the claim for such relief."); *cf.* 7AA Charles Alan Wright, *et al.*, *Federal Practice & Procedure* § 1787, at 525 (3d ed. 2005) ("[O]nce defendant's liability is established, the court may be justified in ... requiring class members to file statements of their claims and barring those not presented at that time.").

The split of authority alleged by petitioners is thus illusory, because the plaintiffs in those cases, unlike petitioners here, were given the option of opting out of the class in the first instance, and were bound by the judgment *regardless* of whether they ultimately filed a claim form to recover damages. Indeed, the very treatise cited by petitioners makes this point: while some courts have "used a claims procedure that, as a practical matter limited the number who shared in the common fund," "[n]one of the certified class actions ... defined the class as requiring the filing of a claim as a precondition to becoming a member of the class." 10 Alba Conte & Herbert Newberg, *Newberg on Class Actions* App. XI, at 253 (4th ed. 2002). Because the cases on which petitioners rely thus do not involve "opt in" classes at all, petitioners manifestly err by asserting that "the Second Circuit decision is contrary to ... well reasoned decisions of other circuit and district courts." Pet. 6 (capitalization modified); *see also* Pet. App. 40a n.7 (noting that petitioners "fall into the same trap" as the district court by "rely[ing] on cases ... where courts required class members to take affirmative action to obtain ultimate relief").

In any event, this case does not present an appropriate vehicle for deciding whether "a court may certify a (b)(3) 'opt-in' class as to liability only under Fed. R. Civ. P. 23." Pet. i. As the Second Circuit explained, "even if circumstances necessitating the certification of such a class could be shown, neither the District Court nor [petitioners] have done so in the case before

us." Pet. App. 42a; *see also id.* at 41a ("[E]ven assuming for the argument that Rule 23 permits courts to certify 'opt in' classes when 'certain circumstances' prove them 'necessary,' the District Court clearly erred in defining such circumstances."). The "opt in" provision at issue here, the Second Circuit explained, "was not ... necessary in any objective sense; rather, it was necessary only because [petitioners] defined it into necessity." Pet. App. 41a; *see also id.* ("[T]he purported necessity of the 'opt in' provision is a function not of the circumstances of this case, but of the particular litigation strategy that plaintiffs chose to pursue."). Accordingly, while the Second Circuit declared that "we cannot envisage any circumstances when Rule 23 would authorize an 'opt in' class in the liability stage of a litigation," Pet. App. 41-42a, the court nonetheless held that petitioners could not justify such a class here *even if* it were authorized. That alternative holding (which petitioners have not even bothered to address) effectively forecloses their efforts to pursue review of the abstract question presented (which, as explained above, is not worthy of this Court's review in any event).

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of *certiorari*.

Respectfully submitted,

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